

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Rules and Regulations Implementing	)	CG Docket No. 02-278
The Telephone Consumer Protection Act	)	
of 1991	)	
	)	
Petition for Declaratory Ruling of	)	
The Fax Ban Coalition	)	

**Comments of Reed Elsevier**

Reed Elsevier Inc. (“Reed Elsevier”), by and through its attorneys and pursuant to the Commission’s November 22, 2005 Public Notice in the above-captioned proceeding,<sup>1</sup> respectfully submits its comments in support of the Petition for Declaratory Ruling (the “Petition”) filed November 7, 2005 by the Fax Ban Coalition (the “Coalition”).

Reed Elsevier is one of the world’s leading publishing and information companies, employing more than 20,000 people in the United States, and more than 35,000 worldwide. Reed Elsevier provides critical information in both hard copy and electronic formats to the government, scientific, legal, educational, and business communities. Within these identified market segments, Reed Elsevier offers a wide array of information-driven services and solutions to businesses. Reed Elsevier businesses and services include:

- Reed Business Information (“RBI”), the largest business-to-business publisher in the United States. RBI provides critical information and marketing solutions to business professionals in the media, manufacturing,

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<sup>1</sup> Public Notice, DA 05-2975 (Nov. 22, 2005); 70 Fed. Reg. 74014 (Dec. 14, 2005).

electronics, construction and retail industries. RBI maintains a long tradition of providing business information through more than 135 business-to-business publications, over 125 Webzines and Web portals, as well as online services, custom publishing, directories, and research.

- Reed Exhibitions, the world's leading organizer of trade and consumer events with more than 470 events in 29 countries.
- LexisNexis, a leading electronic information provider to law offices, corporate legal departments, and governmental agencies.
- Elsevier, a leading publisher and disseminator of literature covering a broad spectrum of scientific endeavors, including such fields as medicine, computer, life and environmental sciences, and mathematics.
- Martindale-Hubbell, which publishes the leading directory of legal professionals.
- Matthew Bender & Company, Inc., a renowned publisher of books and CD-ROMs containing primary and secondary materials used by the legal market.

In Reed Elsevier's experience, its business, professional, and government customers respond favorably to all types of marketing, including fax marketing, when performed responsibly.<sup>2</sup> Reed Elsevier divisions send fax advertisements to existing customers when doing so is the most effective and preferred means of communication. After the Commission, in its July 2003 *Report and Order*<sup>3</sup> implementing the Telephone Consumer Protection Act (the "TCPA")<sup>4</sup> revised its prior interpretation of the TCPA to require express written consent to send faxes to customers with whom the sender has an established business relationship, Congress passed the Junk Fax Prevention Act of 2005<sup>5</sup> (the "JFPA"). The JFPA expressly allows such communications and confirms that the

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<sup>2</sup> The telemarketing activities of Reed Elsevier's divisions occur within the business-to-business context and, thus, fall outside of the Commission's telemarketing rules applying to calls to residences.

<sup>3</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003) ("*2003 TCPA Order*").

<sup>4</sup> Pub. L. No. 102-243, codified at section 227 of the Communications Act of 1934, 47 U.S.C. § 227.

<sup>5</sup> Pub. L. No. 109-21, codified at section 227 of the Communications Act of 1934, 47 U.S.C. § 227.

appropriate policy is to allow businesses to send fax communications to customers without prior written consent.

As described in the Petition, subsequent to enactment of the JFPA, California passed a law that has the effect of removing the federal established business relationship exception for any fax sent to a California recipient. This action, and similar actions of other states, contravene Congressional intent, impede interstate commerce, and place substantial burdens on businesses and consumers by seeking to compel compliance with inconsistent and discriminatory state laws.

The Commission possesses the authority to remedy this situation by declaring that states' efforts to regulate interstate communications are preempted. The Coalition, in its Petition, asks the Commission to issue declaratory rulings (1) affirming the Commission's exclusive authority to regulate interstate commercial fax messages and (2) finding that various state laws purporting to regulate interstate fax transmissions are preempted by the federal TCPA. Reed Elsevier respectfully urges the Commission to grant this Petition without delay.

**I. Congress, in enacting the Junk Fax Prevention Act, affirmed that businesses have the right to send interstate unsolicited fax advertisements where they possess an established business relationship.**

In enacting the Junk Fax Prevention Act last June, Congress codified the Commission's original ruling that businesses may continue to send faxes where they have an established business relationship without the express written consent of the recipient of the fax. Congress indicated that the law is "designed to permit legitimate businesses to do business with their established customers and other persons with whom they have an

established relationship without the burden of collecting prior written permission to send these recipients commercial faxes.”<sup>6</sup>

This codification and the continued ability to send such communications is essential to many legitimate business communications. For example, Reed Exhibitions, a division of Reed Elsevier, transmits fax solicitations to recipients in their business capacity where an established business relationship exists. These faxes ordinarily are sent to a fax machine at an office where a company representative has attended a previous conference. This form of communication, where a description of the conference and agenda is sent to the company, has proven, in many instances, to be the preferred marketing mechanism for recipients. In order to preserve such effective communications and the rationale behind the JFPA, the Commission should grant the petition declaring that the JFPA and the TCPA govern all interstate fax communications and that any state law that purports to do the same is preempted.

## **II. “Interstate communications are totally entrusted to the FCC.”<sup>7</sup>**

### **A. The Act’s Framework of Dual Jurisdiction Does Not Give the States Authority to Regulate Interstate Fax Communications**

The Communications Act of 1934, as amended (the “Act”), contains three fundamental jurisdictional principles. First, the Act grants the Commission exclusive jurisdiction over interstate communication by wire or radio and over all persons engaged in such communication within the United States.<sup>8</sup> Second, the Act gives states

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<sup>6</sup> S. Rpt. 109-76 at 6 (2005).

<sup>7</sup> *NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984).

<sup>8</sup> 47 U.S.C. § 152(a).

jurisdiction over certain intrastate communications – but not, however, over all such communications.<sup>9</sup> Third, the Act specifies those aspects of intrastate communication over which the Commission shall have jurisdiction.<sup>10</sup>

What the Act does not do is grant jurisdiction over interstate communications to any state. To the contrary, as the Courts and this Commission repeatedly have confirmed, “[i]nterstate communications are totally entrusted to the FCC.”<sup>11</sup> Nonetheless, as the Petition and similar requests show, a growing number of states, including California, have sought to regulate interstate facsimile transmissions and other interstate communications.

#### **B. The TCPA Did Not Alter the Act’s Jurisdictional Scheme**

The TCPA and the JFPA embody the very same fundamental principles of jurisdiction set forth in section 2 of the Act. With regard to the division of federal and state authority over the use of telephones and facsimile machines for advertising purposes, three aspects of the TCPA merit attention.

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<sup>9</sup> 47 U.S.C. § 152(b).

<sup>10</sup> *Id.* (“Except as provided in sections 223 through 227, inclusive, and section 332, and subject to the provisions of section 301 and title VI, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service....”). Thus, the Commission’s jurisdiction over intrastate matters is limited (1) as set forth in sections 223, 224, 225, 226, 227, 332, and Title VI of the Act, and (2) to matters other than “charges, classifications, practices, services, facilities, or regulations” in connection with “intrastate communication service.”

<sup>11</sup> *NARUC v. FCC*, 746 F.2d at 1498.

*First*, Congress enacted the TCPA as an amendment to the Act; accordingly, the Commission's authority under the TCPA is part of its plenary authority over *interstate* communications as provided in section 2(a) of the Act.<sup>12</sup>

*Second*, to ensure broad scope of the Commission's rules implementing the TCPA, Congress exempted the TCPA from the "fencing off" provision in section 2(b) of the Act that preserves state jurisdiction over intrastate communications.<sup>13</sup> *See* 47 U.S.C. § 152(b) ("Except as provided in section ... 227 of this title....").

*Third*, Congress added a limited savings clause in the TCPA, preserving state authority to impose "more restrictive *intrastate* requirements or regulations" or prohibitions on telephone and facsimile advertising, 47 U.S.C. § 227(e)(1) (emphasis added).

In enacting the TCPA, Congress did not intend to grant states jurisdiction over interstate communications or otherwise alter the Act's fundamental jurisdictional scheme. In fact, as the legislative history of the TCPA confirms, Congress intended to establish federal standards to address matters of national concern that could not be adequately addressed by state law.

At the same time, the TCPA preserves the role of the states consistent with section 2(b) of the Act. The Act, as amended by the TCPA and the Junk Fax Prevention

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<sup>12</sup> *Cf. AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999) (because the Telecommunications Act of 1996 was inserted into the Communications Act, the FCC's general rulemaking authority extends to the 1996 Act). As Senator Hollings, then-Chairman of the Senate Commerce Committee and one of the co-sponsors of the legislation, stated: "Pursuant to the general preemptive effect of the Communications Act of 1934 [*i.e.*, section 2(a)], State regulation of interstate communications ... is preempted." 137 Cong. Rec. S 18781, S 18784 (Nov. 27, 1991).

<sup>13</sup> *See Louisiana Pub. Serv. Comm. v. FCC*, 476 U.S. 355, 370 (1986) (section 2(b) "fences off" intrastate matters from FCC reach or regulation, and bars federal preemption of state regulation over depreciation of telephone plant and equipment for intrastate ratemaking purposes).

Act, establishes a regime in which businesses engaged in *interstate* facsimile transmissions must comply with a single, federally established standard, thereby avoiding the complications associated with complying with varying state laws. In exchange for a uniform national standard, however, such businesses are subject to multiple enforcers: federal *or* state regulators, or both, can bring enforcement actions for violations of this federal standard.<sup>14</sup> Moreover, although compliance with the federal standard serves as a defense for businesses engaged in interstate faxing, businesses engaged in *intrastate* faxing must comply with state fax laws, even if these laws impose requirements more rigorous than those imposed by federal law.<sup>15</sup>

In sum, it is clear that Congress has given states no authority to regulate interstate facsimile transmissions, and that the Commission has exclusive jurisdiction to regulate such communications.

**III. “A federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.”<sup>16</sup>**

As shown, Congress enacted a statutory scheme that fully protects states’ rights, while establishing federal supremacy over the regulation of interstate communications. In light of this statutory scheme, the Commission may preempt state law that is inconsistent with the TCPA and the Commission’s implementing rules. As the Supreme Court has stated, in language fully applicable here:

[I]n proper circumstances the agency may determine that its authority is exclusive and pre-empt any state efforts to regulate in the forbidden area.... It

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<sup>14</sup> See 47 U.S.C. §§ 227(f)(1), (f)(2) & (f)(4).

<sup>15</sup> *Id.* § 227(f)(6).

<sup>16</sup> *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 369 (1986).

has long been recognized that many of the responsibilities conferred on federal agencies involve a broad grant of authority to reconcile conflicting policies. Where this is true, the Court has cautioned that even in the area of pre-emption, if the agency's choice to pre-empt "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."<sup>17</sup>

Further, the Supreme Court has made clear that when "the State regulates in an area where there has been a history of significant federal presence" there is not a presumption against preemption.<sup>18</sup> Pursuant to section 2(a) of the Act, the Commission has long exercised "comprehensive authority" over interstate telecommunications.<sup>19</sup> Consequently, where, as described in the Fax Ban Coalition's Petition, state law impinges on *interstate* telecommunications – an area where "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers" – there is no presumption against the authority of the Commission to preempt state law.<sup>20</sup>

The Commission "occupies the field" of regulation of interstate telecommunications. Section 2(a) of the Act makes clear that the Commission has exclusive jurisdiction over all interstate wire and radio communications. Congress plainly intended the Commission to establish uniform rules regarding interstate telecommunications and thereby safeguard against inconsistent state rules.<sup>21</sup>

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<sup>17</sup> *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (citations omitted)

<sup>18</sup> *United States v. Locke*, 529 U.S. 89, 108 (2000).

<sup>19</sup> *Capital Cities Cable v. Crisp*, 467 U.S. 691, 700 (1983) (finding that FCC regulations preempted local standards); *City of New York v. FCC*, 486 U.S. 57, 63-64 (1987) (same).

<sup>20</sup> *Locke*, 529 U.S. at 108.

<sup>21</sup> *See Louisiana Pub. Serv. Comm. v. FCC*, *supra*.



The Commission already has acknowledged its authority to preempt state laws that seek to regulate interstate facsimile transmissions, in violation of the Act's jurisdictional framework. In 2003, the Commission addressed the preemptive effect of its rules implementing the TCPA.<sup>22</sup> The Commission noted that some states may have adopted rules that are less restrictive than the federal rules. The Commission concluded that its rules would preempt such state rules, with regard to both interstate and intrastate calls, because "application of less restrictive state exemptions directly conflicts with the federal objectives in protecting consumer privacy rights under the TCPA."<sup>23</sup>

Moreover, with regard to states that had adopted laws more restrictive than the federal rules, the Commission concluded that such rules, with respect to interstate calls, would "almost certainly conflict" with the Commission's rules and be preempted.<sup>24</sup> The Commission continued:

We recognize that states traditionally have had jurisdiction over only intrastate calls, while the Commission has had jurisdiction over interstate calls. Here, *Congress enacted section 227 and amended section 2(b) to give the Commission jurisdiction over both interstate and intrastate telemarketing calls. Congress did so based upon the concern that states lack jurisdiction over interstate calls.* Although section 227(e) gives states authority to impose more restrictive intrastate regulations, we believe that it was the clear intent of Congress generally to promote a uniform regulatory

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<sup>22</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Dkt. No. 02-278, *Report and Order*, 18 FCC Rcd 14014 ¶ 78-85 (2003) ("2003 TCPA Order"). Although the Commission's focus in the 2003 TCPA Order was on its do-not-call rules, its interpretation of the preemptive effect of its telemarketing regulations extends to all activities to which the TCPA's "savings clause," 47 U.S.C. § 227(e)(1), applies. The savings clause extended the Commission's jurisdiction under the TCPA to intrastate calls in order to create a regulatory "floor"; that is, the clause allows states to impose more stringent regulation of (and even to prohibit) certain *intrastate* calls, but preempts less restrictive state rules in regard to intrastate calls. Section 227(e)(1), however, has no effect on the Commission's long-standing exclusive authority over *interstate* communications, in regard to which federal law occupies the field.

<sup>23</sup> *Id.* ¶ 81.

<sup>24</sup> *Id.* ¶ 82.

scheme under which telemarketers would not be subject to multiple, conflicting regulations. *We conclude that inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion....*

*We therefore believe that any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted....*<sup>25</sup>

Even prior to this confirmation of its preemptive authority, the Commission warned that “any state regulation of interstate telemarketing that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted,”<sup>26</sup> and “encourage[d] states to avoid subjecting telemarketers to inconsistent rules.”<sup>27</sup> Finally, the Commission invited “any party that believes a state law is inconsistent with section 227 or our rules [to] seek a declaratory ruling.”<sup>28</sup> Numerous parties have done so following states’ failure to heed the Commission’s guidance. The Commission should now declare preempted those states’ laws that seek to regulate interstate facsimile transmissions.

WHEREFORE, Reed Elsevier respectfully requests the Commission to promptly grant the Petition for Declaratory Ruling filed by the Fax Ban Coalition.

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<sup>25</sup> *Id.* ¶¶ 83, 84 (emphasis added).

<sup>26</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Dkt. No. 02-278 & CC Dkt. No. 92-90, *Notice of Proposed Rulemaking*, 17 FCC Rcd 17459 ¶ 84 (2002).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

Respectfully submitted,

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